Supreme Court, U.S.
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In the Supreme Court of the United States

IN RE MICHAEL DUANE WILCOX, Debtor

CHARLES TAUNT, TRUSTEE FOR
THE BANKRUPTCY ESTATE OF
MICHAEL DUANE WILCOX
Plaintiff-Petitioner

v.

GENERAL RETIREMENT SYSTEM OF
THE CITY OF DETROIT, and the BOARD OF
TRUSTEES OF THE GENERAL RETIREMENT
SYSTEM OF THE CITY OF DETROIT,
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court in *In re Wilcox*, 233 F.3d 899 (6th Cir. 2000) held that incorporation of a retirement plan's anti-assignment provision in a city charter meant that the plan's restriction on transfer was "enforceable under applicable nonbankruptcy law" and, thus that a bankruptcy debtor's pension rights were not property of the estate and were not to be turned over to the debtor's bankruptcy trustee. This holding raises the following substantial bankruptcy issues that warrant review by this Court:

1. The *Wilcox* decision disregarded this Court's decision in *Patterson v. Shumate*, 504 U.S. 753, 758 (1992), and creates an intolerable conflict between the circuits on an important federal issue of widespread importance with *In re Lowenschuss*, 171 F.3d 673, 682 (9th Cir.) *cert. denied* --- U.S. ---, 120 S.Ct. 185 (1999), regarding whether the mere presence of anti-alienation language in a city charter or state statute is "enforceable under applicable nonbankruptcy law" in the absence of a right of action to enforce the anti-alienation provision.

2. The Sixth Circuit's decision in *Wilcox* "departed from the accepted and usual course of judicial proceedings" by clearly misinterpreting Michigan law regarding the enforceability of the anti-assignment provision in the City of Detroit's charter. The Michigan Supreme Court would not enforce it because, inter alia, it would characterize the Annuity Savings Plan as a self-settled trust, as did the United States District Court and the United States Bankruptcy Court in this matter.

RULE 14.1(b) AND 29.6 STATEMENT

The parties in the court of appeals were Petitioner Charles Taunt, Trustee for the Bankruptcy Estate of Michael Duane Wilcox, and Respondent General Retirement System of the City of Detroit, and the Board of Trustees of the General Retirement System of the City of Detroit. None of the parties are corporate entities.

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II. The *Wilcox* decision misinterpreted Michigan law regarding the enforceability of the anti-assignment provision in the City of Detroit's charter; the Michigan Supreme Court would not enforce it

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The underlying decision by the Court of Appeals for the Sixth Circuit which reversed the District and the Bankruptcy Courts is reported at 233 F.3d 899 (6th Cir. 2000)(App., *infra,* 1a). The decision of the Court of Appeals for the Sixth Circuit on the petition for rehearing and suggestion en banc is not reported (App., *infra,* 17a). The decision by the District Court for the Eastern District of Michigan is unreported (App., *infra* 19a). The bankruptcy court decision is reported at 225 B.R. 151 (Bankr.E.D.Mich. 1998)(App., *infra*, 33a).

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2000. (App., *infra*, 1a). A timely petition for rehearing was denied on January 20, 2001 (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Pursuant to 11 U.S.C. § 541(c)(2):

> "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

The Detroit City Charter which the Sixth Circuit in the instant case found to be enforceable under nonbankruptcy law provides that:

> "The right of a person to a pension....and the moneys in the various funds of the retirement system shall be unassignable and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency law, or any other process of law whatsoever, except as specifically provided in this chapter." Detroit City Charter, Title 9, Chap.6, Art. 9, §§ 1 (1964).

The Ninth Circuit, in the conflicting Court of Appeals opinion in *In re Lowenschuss*, 171 F.3d 673 (9th Cir. 1999) found the equivalent statutory language not to be enforceable under nonbankruptcy law; Pennsylvania statute, 42 Pa. Cons.Stat. § 8124(b)(1)(ix), provides:

> "§8124. Exemption of particular property. (b) Retirement funds and accounts.-- ...the following...shall be exempt from attachment or execution on a judgment...(ix)[a]ny retirement or annuity fund provided for under section 401(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code..."

STATEMENT OF THE CASE

A. Property of the Debtor's Bankruptcy Estate

The filing of a bankruptcy petition creates an estate comprised of all legal or equitable interests of the debtor in property. 11 U.S.C. §541(a)(1). Property which falls under §541(c)(2), however, is excluded from the estate. That section provides, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." If property is excluded from the bankruptcy estate, it cannot be administered for the benefit of the bankruptcy debtor's creditors. If property is not excluded from the bankruptcy estate, it will be administered (liquidated) for the benefit of creditors unless the debtor can exempt her interest under 11 U.S.C. §522. Under 11 U.S.C. §522(d)(10), only retirement assets that are "reasonably necessary for the support of the debtor and any dependent of the debtor" can be exempted. Accordingly, if a retirement asset is excluded from becoming property of the debtor's bankruptcy estate under 11 U.S.C. §541(c)(2), that property cannot be administered for the benefit of the debtor's creditors, whether or not it is reasonably necessary for the debtor's or her dependent's support.

B. Factual Background

The Debtor participates in two separate retirement plans administered by Respondent General Retirement System of the City of Detroit ("GRS"). The first is a

Defined Benefit Plan funded exclusively by the City of Detroit, which Petitioner, the bankruptcy debtor's trustee, concedes is not property of the Debtor's bankruptcy estate (and is thus available for the Debtor and not his creditors).

The Debtor also participates in the Annuity Savings Plan which allows employees to make voluntary contributions from their salaries to an annuity savings fund while deferring the payment of taxes. The Annuity Savings Plan has no traditional plan documents; instead, the Plan is comprised of various provisions of the Detroit City Charter and collective bargaining agreements. The Debtor made all contributions to the Annuity Savings Plan. Participants may obtain a loan from the Detroit Municipal Credit Union by pledging their interest in the Annuity Savings Plan as collateral for a loan, and take the monies out of the Annuity Savings Plan as they would with a secured credit card.

The record shows, and the bankruptcy court found, that the instant Debtor had pledged his interest in the Annuity Savings Plan as collateral for a loan with the Detroit Municipal Credit Union. GRS admitted that it knew that the plan participants were regularly obtaining loans from the Detroit Municipal Credit Union by granting a security interest in the proceeds of the Plan, even sending out a reminder notice to plan participants advising them that they would send the proceeds of their Annuity Savings Plan to the Detroit Municipal Credit Union if they had taken out a loan.

C. The Court of Appeals Decision

Though the District Court had affirmed the Bankruptcy Court's determination that the Debtor's interest in the Annuity Savings Plan was property of the estate because there was no "applicable nonbankruptcy law" that could be invoked to enforce the anti-alienation language in the City Charter, the Court of Appeals for the Sixth Circuit reversed, holding that "[t]he anti-assignment provision of the Detroit plan is enforceable because it is part of the Detroit City Charter and has the status of any city charter provision. Michigan courts have enforced various provisions of the Detroit City Charter, including those relating to the Plan, without regard to the availability of a statutory right of action". *Wilcox*, 233 F.3d at 906.

REASONS FOR GRANTING THE WRIT

I. The Decision below exacerbates a conflict between the circuits regarding the proper interpretation of 11 U.S.C. §541(c)(2) and this Court's recent opinion in *Patterson v Shumate*, including, inter alia, whether the mere presence of anti-alienation language in a trust document, State statute or a city charter is enforceable "under applicable nonbankruptcy law" for purposes of the 11 U.S.C. §542(c)(2) exclusion of property from the bankruptcy debtor's estate.

Nine years ago this Court granted certiorari in *Patterson v Shumate*, "to resolve the conflict among the

Courts of Appeals as to whether an antialienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the § 541(c)(2) exclusion of property from the debtor's bankruptcy estate." *Patterson v. Shumate*, 504 U.S. 753, 757 (1992). Since that time, there have been more than 500 reported cases in which Patterson has been cited. Since that time also, billions of dollars of retirement assets have been, and are currently being, administered by State and local governments for the benefit of their employees.

Due to the importance of this Court's decision in *Patterson v Shumate* regarding the ability of a bankruptcy debtor to protect (or keep) her retirement assets from her creditors, courts have been required to further interpret whether anti-alienation language in other retirement plans was enforceable under "applicable nonbankruptcy law" for purposes of the §541(c)(2) exclusion of property from the debtor's bankruptcy estate.

One of the major points of disagreement between the circuits in interpreting §541(c)(2) in light of this Court's teachings in *Patterson*, is whether the mere presence of anti-alienation language in a trust document, State statute or city charter is enforceable under "applicable nonbankruptcy law" for purposes of the §541(c)(2) exclusion of property from the debtor's bankruptcy estate.

Almost two years ago, this Court denied a Petition for Writ of Certiorari in *Lowenschuss v. Selnick*, 528 U.S. 877 (1999) which attempted to bring this issue to the

Court, though not in as pristine a form as the instant decision below. In that case, there were numerous fact-intensive issues extraneous to the 11 U.S.C. §541(c)(2) issue, which are not present in the instant case, including issues regarding domicile and whether the appointment of a chapter 11 trustee for the individual debtor was proper. The instant case, however, squarely raises the issue whether the mere presence of anti-alienation language is sufficient, without the extraneous issues in *Lowenschuss*.

A. The Conflict Between the Circuits

As the Sixth Circuit candidly admitted below, the circuits are in conflict regarding whether the mere presence of anti-alienation language in a trust document, State statute or city charter is enforceable under "applicable nonbankruptcy law" for purposes of the §541(c)(2) exclusion of property from the debtor's bankruptcy estate. In *Wilcox*, the Sixth Circuit stated:

> "Our sister circuits have largely agreed that, after *Patterson*, state and federal restrictions on alienation can satisfy §§ 541(c)(2) even where there is no statutory right of action....*But see In re Lowenschuss*, 171 F.3d 673, 682 (9th Cir.) (holding that a state anti-alienation provision must contain some "mechanism" for enforcement in order to satisfy §§ 541(c)(2)), *cert. denied*, 120 S.Ct. 185 (1999)."

In *Lowenschuss*, the Court of Appeals for the Ninth Circuit had already pointed out the conflict in the circuits, stating:

> "We recognize that our decision creates a split among the circuits ...'to accept the premise espoused in *Meehan* [*In re Meehan*, 102 F.3d 1209 (11th Cir.1997)] that a transfer restriction within a state statute is sufficient to meet the requirements of § 541(c)(2), would render the language 'enforceable under nonbankruptcy law' nugatory and meaningless surplusage .....we view our decision as requiring only that the trust instrument contain the restriction, and that the applicable federal or state law provides a means to enforce that restriction. *See Patterson*, 504 U.S. at 758, 112 S.Ct. 2242...Only if the transfer restriction contained in the trust instrument is enforceable under applicable nonbankruptcy law can the debtor's beneficial interest in that trust be excluded from the bankruptcy estate. *See* 11 U.S.C. § 541(c)(2); *Patterson*, 504 U.S. at 758, 760, 112 S.Ct. 2242. Because a debtor must be able to enforce the transfer restriction contained in a trust instrument under applicable nonbankruptcy law, and because section 8124(b) does not provide a means to enforce a transfer restriction contained in a trust, section 8124(b) cannot operate to exclude from the bankruptcy estate Debtor's

interest in the Pension Plan."

Lowenschuss, 171 F.3d at 681-682.

B. The *Wilcox* Decision Is Inconsistent with this Court's Decision in *Patterson V. Shumate*, 504 U.S. 753, 758 (1992) and Subsequent Circuit Court Case law Which Require More than the Mere Presence of Anti-alienation Language in a Trust Document, State Statute, or City Charter.

In this case, the Sixth Circuit in *Wilcox* held that "the district court erred in reading *Patterson* as requiring that...a right of action (to enforce the anti-alienation provision) be provided if an anti-assignment provision is to be considered 'enforceable' for purposes of § 541(c)(2)". This reading of *Patterson* is incorrect, and conflicts with Circuit Court decisions requiring that the anti-alienation language in a retirement plan or contract, trust document, State statute or city charter be enforceable under a specific law.

i. *Patterson* and 11 U.S.C. §541(c)(2) Require More than the Mere Presence of Anti-Alienation Language in a Retirement Plan or Contract

Patterson v Shumate

In *Patterson v. Shumate*, 504 U.S. at 758, after the Supreme Court determined that "applicable nonbankruptcy law" includes the Employee Retirement

Income Security Act of 1974 ("ERISA"), and that anti-alienation provisions existed in the subject "ERISA-qualified plan", the Court **then** was required to determine if the anti-alienation language was enforceable under ERISA. *Patterson*, 504 US at 759-760 ("Moreover, these transfer restrictions are "enforceable," as required by § 541(c)(2)"). Accordingly, the mere presence of anti-alienation language in the *Patterson* retirement plan was not enough to exclude the retirement plan from becoming property of the estate. The Court was required to make a further inquiry, whether the anti-alienation provision was "enforceable under applicable nonbankruptcy law" as required by the plain language of 11 U.S.C. §541(c)(2).

It was for this reason that the Supreme Court instructed in *Patterson* that governmental plans or contracts,[1] as in the instant case, would not be exempt despite the presence of anti-alienation language because there was no independent ability to enforce the anti-alienation language.[2]

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[1]In 1993, Congress contemplated amending 11 U.S.C. §541 to exclude such governmental retirement plans or contracts from becoming property of the estate, however, Congress declined to pass that legislation. *See* Carla Michele Schiff, *Protecting Non-ERISA Pension Funds from the Reach of Creditors in Bankruptcy* 11 BANKRUPTCY DEVELOPMENTS JOURNAL 155 (1995).

[2]" pension plans established by **governmental entities** and churches need not comply with Subchapter I of ERISA, including the antialienation requirement of § 206(d)(1)....Although **a debtor's interest in these**

ii. The *Wilcox* Decision Is Inconsistent with Circuit Court Case Law Which Requires That the Anti-Alienation Language be Enforceable in Reference to a Specific Nonbankruptcy Law.

There are no documents other than the Detroit City Charter and various collective bargaining agreements that make up the text of the Annuity Savings Plan; the "contract" or "trust document" is the city charter. The *Wilcox* decision held that the presence of the anti-alienation provision in the charter (contract) itself made the anti-alienation provision enforceable under applicable nonbankruptcy law. This is inconsistent with *Patterson*, and Circuit Courts that have interpreted *Patterson*. For example, in *In Re Lowenschuss*, 171 F.3d at 682, on precisely the same operative facts as in the instant case, the Ninth Circuit found that although the debtor relied on an applicable state statute exempting funds in his pension plan from attachment or execution, the plan was not excluded under §541(c)(2) because the statute did not provide a mechanism for enforcing the transfer restriction.

II. The *Wilcox* Decision Misinterpreted Michigan Law Regarding the Enforceability of the Anti-assignment Provision in the City of Detroit's Charter; The Michigan Supreme Court Would Not Enforce it Because it Would Characterize it as a Self-settled Trust

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plans could not be excluded under § 541(c)(2) because the plans lack transfer restrictions enforceable under "applicable nonbankruptcy law," that interest nevertheless could be exempted under § 522(d)(10)(E). [emphasis added]". *Patterson*, 112 S.Ct. at 2248-2249.

A. The Michigan Supreme Court Would Not Enforce the Anti-alienation Provision

In determining "applicable nonbankruptcy law", the Sixth Circuit was required to determine how the Michigan Supreme Court would hold when interpreting Michigan law. *Garden City Osteopathic Hospital v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir.1995). The Michigan Supreme Court has never had the issue before it as to whether to enforce the anti-alienation language in the City of Detroit Charter with regard to the Annuity Savings Plan. Because of longstanding Michigan Supreme Court law finding that self-settled trusts are not exempt from creditors under applicable Michigan law, and because the Michigan Supreme Court may review the substance of a transaction and disregard form,[3] the Michigan Supreme Court would not enforce the anti-alienation language in the Annuity Savings Plan, finding it to be a self-settled trust, and thus the Wilcox decision was wrongly decided.

Permitting loans from the plan is wholly inconsistent with the intent of a spendthrift trust, which is "to provide a fund for the maintenance of the beneficiary and at the same time to secure it against his improvidence or incapacity." *Fornell v. Fornell Equip., Inc.*, 390 Mich. 540, 548, 213 N.W.2d 172 (1973). Accordingly, anti-alienation provisions in employee benefit plans are unenforceable under Michigan law to the extent that the plan is funded by voluntary employee contributions, [as in the instant case] on the theory that the plan is in essence self-settled.' " *In re Dunn*, 215 B.R. 121, 128 (Bankr. E.D.Mich.1997)(*quoting In re Idalski*, 123 B.R. 222, 233

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[3]*City of Ann Arbor v. University Cellar, Inc.*, 401 Mich. 279, 258 N.W.2d 1 (1977)("And it is substance, not form, that controls the resolution of cases").

(Bankr. E.D.Mich.1991)(collecting cases)).[4]

B. The *Wilcox* Opinion

The *Wilcox* decision held that the "the anti-assignment provision of the Detroit City Charter represents 'enforceable' nonbankruptcy law for purposes of 11 U.S.C. § 541(c)(2)" for the reasons set forth below in bold-faced type. The Trustee has set forth below each of these reasons why the *Wilcox* decision's analysis misconstrued Michigan Law.

i. **"Michigan courts have enforced various provisions of the Detroit City Charter, including those relating to the Plan, without regard to the availability of a statutory right of action. *See, e.g., Weeks v. Bd. of Trustees, City of Detroit General Retirement System*, 160 Mich.App. 81, 408 N.W.2d 109 (1987) (holding that a forfeiture provision in the plan was enforceable); *Lauderdale v. Detroit Municipal Credit Union*, No. 97- 720027-CP, at 9 (Circuit court, Wayne County, Mich., March 10, 1998)..."**

As indicated above, the role of this Court in divining Michigan law is to determine how the Michigan Supreme Court would interpret Michigan law. The cases

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[4]*See also In re Swanson*, 873 F.2d 1121, 1124 (8th Cir.1989)(anti-alienation provisions in benefit plans are unenforceable under state spendthrift law to the extent that the plan is funded by voluntary employee contributions because such Plans are essentially self-settled).

cited to above are from a trial court in the county where the City of Detroit is located and an intermediate appellate Court. The statement in *Wilcox* that the City of Detroit Charter is enforced by Michigan Courts does not take into account that not all intermediate State Courts enforce the charter.[5]

The Michigan Supreme Court, however, has interpreted the City of Detroit Charter provision to be merely contractual, and as indicated above, the mere presence of an anti-assignment provision in a retirement plan or contract is insufficient to exempt the retirement plan or contract.

The Michigan Supreme Court merely construes the charter provisions as contractual[6], and not as, in the Michigan Supreme Court's own words, "state law".[7] *See Detroit Police Officers Ass'n. v. Detroit*, 391 Mich. 44, 63,

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[5]*See e.g. Association of Professional and Technical Employees v. City of Detroit*, 154 Mich.App. 440, 398 N.W.2d 436 (1986)(refusing to enforce proposed amendment to city charter).

[6]*See also City of Detroit v. Bridgeport Brass Co.*, 28 Mich.App. 54, 184 N.W.2d 278 (1970)(declining to find that subrogation required by statute but holding that it was required under ordinary contract principles pursuant to City of Detroit Charter)

[7] Nor could the Michigan legislature delegate law making authority to the City of Detroit. *See e.g. Dep't of Natural Resources v. Seaman*, 396 Mich. 299, 308, 240 N.W.2d 206 (1976)("The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend").

214 N.W.2d 803 (1974)[8]

As indicated by the Michigan Supreme Court in *Detroit Police Officers*, 391 Mich at 63, the Home Rule Cities Act, though a state law, is merely enabling legislation to grant to the City of Detroit the power to institute a retirement plan, much as the Michigan legislature similarly enabled the board of directors of a corporation to bind a corporation. *See e.g.* MCLA §450.1523; §450.1525.[9]

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[8] In that case, the Michigan Supreme Court held "The Home Rule Cities Act, a state law, requires only that the charter grant to the city government the authority to institute and maintain a retirement plan. The substantive details of a retirement plan, such as those now a part of the Detroit City Charter, are contractual and charter provisions only and do not rise to the statute of a state law requirement as the City would have us hold. Accordingly, since the substantive details of the retirement plan may be classified only as contractual or charter provisions, they are subject to the duty to bargain found in PERA--a state law. "

[9] The appellate case cited to by the Wilcox decision is not inconsistent. In *Weeks v. Bd. of Trustees, City of Detroit General Retirement System*, 160 Mich.App. 81, 408 N.W.2d 109 (Ct.App.Mich.1987), the Michigan Court of Appeals merely held that "We conclude that the forfeiture provision of the Detroit Charter does not violate the equal protection clause."

2. "When a Michigan appeals court considered the benefits available to Detroit police officers, it said that "[w]ell-established rules of statutory construction mandate that we enforce this clear statutory and city charter language." *Crowe v. City of Detroit*, 237 Mich.App. 397, 603 N.W.2d 107, 110 (1999)..."

Again, this intermediate appellate court decision is not inconsistent with the view that the City of Detroit Charter provision is merely contractual. The record indicates that there are no writings to evidence the agreement between the City of Detroit and its employees other than in the City of Detroit Charter. This is the contract between the parties, which is accepted by the employee's service for the City of Detroit. The fact that in *Crowe*, the Michigan Court of Appeals held that an employee was bound by the language in the retirement plan does not indicate that the City of Detroit Charter is "enforceable nonbankruptcy law". As indicated above, the mere presence of anti-assignment language in a retirement plan or contract is not sufficient to keep it from becoming property of the bankruptcy estate.[10]

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[10]Moreover, the provision in the City of Detroit's police retirement plan was not "enforced", as suggested by the *Wilcox* decision, the Michigan Court of Appeals merely held that periodic disability benefits paid to police officers, pursuant to the city charter, were "like benefits," for purposes of a statute barring a municipal police officer from receiving both worker's compensation benefits and like benefits provided by officer's employing municipality). *Crowe*, 237 Mich at 398 ("The significant issue in these consolidated appeals is whether the pension benefits received by the plaintiffs are "like benefits" for purposes of subsection 161(1)(c) of the Worker's Disability

3. "the non-alienation provision of the Detroit plan is enforceable by the retirement system itself...When the retirement system chooses not to honor a request to disburse funds in violation of applicable law, it is enforcing the law."

This argument proves too much, being akin to "might makes right". If the mere fact that a retirement plan's failure to honor a disbursement request makes the money in the retirement plan not property of the estate, merely because of anti-alienation language in a retirement plan, *Patterson v Shumate* was incorrectly decided because it not only required contractual anti-alienation language, it also required that the language be enforceable by applicable nonbankruptcy law. Moreover, the statement by the *Wilcox* decision that the retirement system can choose not to honor a request to disburse funds in **"violation of applicable law"** begs the question as to whether applicable law will enforce the anti-alienation restriction.

4. " Michigan courts commonly treat city charters just as they do any other source of state law. *See, e.g., City of Detroit v. Walker*, 445 Mich. 682, 520 N.W.2d 135, 139 (Mich.1994) (holding that traditional principles of statutory construction apply to the Detroit City Charter)."

Michigan courts construe all written texts using traditional principles of statutory construction, e.g. look first to the plain language of the written text to determine its legal meaning. The mere fact that it utilizes the plain language approach to the interpretation of the City of Detroit Charter that it applies to statutes does not give the

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Compensation Act (WDCA)").

City of Detroit Charter the status of statutory law, any more than decisions by the Michigan Courts applying the plain language method of statutory construction to language in a simple contract.[11]

Conclusion

Since this Court granted certiorari in *Patterson v. Shumate*, intermediate courts have been grappling with the issue as to which anti-alienation language in retirement plans is "enforceable under applicable nonbankruptcy law"; if the anti-alienation language is enforceable, the retirement asset will not become property of the estate which the bankruptcy trustee could administer (liquidate) for the benefit of the debtor's creditors. Since *Patterson*, the issue as to which retirement assets become property of the bankruptcy estate has been the subject of vigorous debate by judges and commentators alike. Considering that billions of dollars in retirement assets are administered by state and local governments for the benefit of their employees, whether these assets become property of the bankruptcy estate has a profound economic impact upon the dividend that creditors receive in bankruptcy proceedings.

Unfortunately, the intermediate courts are in disarray on this issue; on the same operative facts, the Sixth Circuit in the instant case in *Wilcox*, 233 F.3d 899 came to the diametrically opposite conclusion as did the Ninth Circuit in *Lowenschuss*, 171 F. 3d 673. The *Wilcox* decision is also at odds with the Bankruptcy Code and this

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[11]*Leja v. Health Alliance Plan*, 202 Mich.App. 582, 509 N.W.2d 871 (1993)("When interpreting an insurance contract, the contract language must be given its ordinary and plain meaning, not a technical or strained construction").

Court's decision in *Patterson v Shumate*, which both require more than the mere presence of anti-alienation language in a trust document, State statute or city charter, they also require that the anti-alienation language be "enforceable under nonbankruptcy law".

There is little to be gained from further consideration of this issue by lower levels of the judiciary. Hundreds of decisions and law review articles have discussed the issue in painstaking detail, considering every possible nuance of the issue. Until this Court provides a definitive answer on the issue, however, governmental employees who file a bankruptcy in the Sixth Circuit will be treated differently than bankruptcy debtors in other parts of the United States, though their factual circumstances are identical.

The question presented by this petition for certiorari has enormous practical significance upon a large number of bankruptcy cases, and the instant petition should be granted.

Respectfully submitted,

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Dated: April 14, 2001

No. 99-1726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MICHAEL DUANE WILCOX,

Debtor.

CHARLES J. TAUNT, TRUSTEE,

Plaintiff-Appellee,

v.

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT AND BOARD OF TRUSTEES OF THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Defendants-Appellants.

Appeal from the United States District Court

for the Eastern District of Michigan at Ann Arbor.

No. 98-60511--Barbara K. Hackett, District Judge.

Argued: August 4, 2000

Decided and Filed: November 13, 2000

Before: NELSON and NORRIS, Circuit Judges; MATIA, Chief District Judge.(*)

COUNSEL

ARGUED: Peter A. Jackson, CLARK HILL, Detroit, Michigan, for Appellants. Timothy A. Fusco, CHARLES J. TAUNT & ASSOCIATES, Birmingham, Michigan, for Appellee. ON BRIEF: Lira A. Johnson, CLARK HILL, Detroit, Michigan, Judith Greenstone Miller, CLARK HILL, Birmingham, Michigan, for Appellants. Timothy A. Fusco, CHARLES J. TAUNT & ASSOCIATES, Birmingham, Michigan, for Appellee. Ernest L. Jarrett, Detroit, Michigan, for Amicus Curiae.

OPINION

DAVID A. NELSON, Circuit Judge. Although the Bankruptcy Code provides, in general, that all of a bankrupt debtor's property interests are to be turned over to the trustee in bankruptcy for the benefit of creditors, the code creates the following exception: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2).

The debtor in the case at bar has a beneficial interest in assets held by the trustees of a municipal employees' retirement plan. The terms of the plan have been effectively incorporated in the city charter adopted by the municipality pursuant to state law home-rule provisions. The plan (and thus the city charter) provides that the debtor's interest is "unassignable" and is not subject to execution, attachment, or the operation of bankruptcy law.

The question presented is whether this restriction is "enforceable under applicable nonbankruptcy law." If it is, the restriction is enforceable in bankruptcy proceedings as well, and the debtor's pension rights are not to be turned over to the trustee in bankruptcy. If the restriction is not enforceable, we shall assume for purposes of this opinion that the trustee in bankruptcy can compel a turnover. (There is a timing issue in this connection, but we need not reach that question.)

Concluding that the restriction on transfer is not enforceable under applicable nonbankruptcy law, the bankruptcy court entered a summary judgment in which it held that the debtor's retirement plan interest had to be turned over to the bankruptcy trustee. The district court affirmed that judgment on appeal. On de novo review, however, we conclude that the restriction is enforceable under applicable nonbankruptcy law. We shall therefore reverse the district court's disposition of the case.

I

The Michigan Constitution gives Michigan cities the power to adopt charters and ordinances.(1) It further provides that the "provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Mich. Const. Art. VII, § 34.

The Michigan Home Rule City Act, Mich. Comp. Laws §§ 117.1 et seq., authorizes charter cities to exercise any power, enumerated or not, that advances the interests of the city. Mich. Comp. Laws § 117.4j(3).(2) Michigan courts commonly treat city charters just as they do any other source of state law. *See, e.g., City of Detroit v. Walker*, 520 N.W.2d 135, 139 (Mich. 1994) (holding that traditional principles of statutory construction apply to the Detroit City Charter).

Pursuant to the authority granted by the Michigan Constitution and the Michigan Home Rule City Act, the City of Detroit has established a defined contribution retirement plan for its employees. The plan, which is funded by voluntary employee contributions, is administered by the General Retirement System of the City of Detroit.

For decades, the city's defined contribution retirement plan - the terms of which were initially written into the Detroit City Charter - has contained an anti-assignment provision reading as follows:

> "The right of a person to a pension, annuity, or a retirement allowance, to the return of accumulated contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter and the moneys in the various funds of the retirement system shall be unassignable and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency law, or any other process of law whatsoever, except as specifically provided in this chapter." Detroit City Charter, Title 9, Chap.6, Art. 9, § 1 (1964) (emphasis supplied).

Since 1974, when a new charter was adopted by the City of Detroit, the plan has been the subject of collective bargaining between the city and various unions. The plan is, however, incorporated in the charter by reference. The current version of the Detroit City Charter, adopted in 1997, accomplishes this in the following language:

> "The retirement plans of the city existing when this Charter takes effect, including the existing governing bodies for administering those plans, the benefit schedules for those plans and the terms for accruing right to and receiving benefits under those plans shall, in all respects, continue in existence exactly as before unless changed by this Charter or an ordinance adopted in accordance with this article." Detroit City Charter, Art. 11, § 11-102 (1997).

The anti-assignment terms of the retirement plan have thus been continued, under the new charter, "exactly as before," no change in these terms having been effected by charter or ordinance.

(We note parenthetically that Michigan law also restricts the transfer of retirement plan interests of public employees who are not on the payroll of a home-rule municipality:

> "The right of a person to a pension, an annuity, a retirement allowance, any optional benefit, any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all money and investments and income of the funds, are exempt from any state, county, municipal, or other local tax, and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law, and shall be unassignable except as otherwise provided in this act." Mich. Comp. Laws § 38.40(1) (emphasis supplied).)

The debtor in the case at bar, Michael Duane Wilcox, is both an employee of the City of Detroit and a participant in the city's defined contribution retirement plan. The terms of the plan permit the withdrawal of funds from Mr. Wilcox's account only upon his death, the termination of his employment, his completion of 25 years of service, or his retirement under a disability. None of these conditions has been met.

Mr. Wilcox entered into a revolving loan agreement with the Detroit Municipal Credit Union on July 19, 1995. Notwithstanding the anti-assignment provision of the retirement plan, and in keeping with what appears to have been a common practice, Mr. Wilcox purported to pledge his interest in the plan as collateral for the loan.(3)

A few months after taking out the credit union loan, Mr. Wilcox filed a voluntary petition under Chapter 7 of the Bankruptcy Code. In the course of the ensuing proceedings the bankruptcy court ordered that Mr. Wilcox's interest in the plan, which then amounted to $32,141.66, be turned over to the bankruptcy trustee. The retirement system declined to comply with the order, advising the bankruptcy trustee that Mr. Wilcox's interest could not be turned over because (a) the plan contained an anti-alienation provision prohibiting such transfers, (b) Mr. Wilcox was not yet eligible to receive benefits, and (c) the system was not bound by the bankruptcy court's order.

The bankruptcy trustee then commenced the present adversary proceeding against the retirement system and its board of trustees. On cross-motions for summary judgment, the bankruptcy court ruled in favor of the trustee in bankruptcy. Following an unsuccessful motion for reconsideration, the retirement system filed a timely notice of appeal to the United States District Court for the Eastern District of Michigan. That court affirmed, and the appeal to our court followed.

II

The question before us, to repeat, is whether the anti-assignment provision of the defined contribution retirement plan, as incorporated in the city charter, is "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ." 11 U.S.C. § 541(c)(2).

An inquiry under § 541(c)(2) normally has three parts: First, does the debtor have a beneficial interest in a trust? Second, is there a restriction on the transfer of that interest? Third, is the restriction enforceable under nonbankruptcy law?

Here it is undisputed that Mr. Wilcox's interest in the plan is an interest in a "trust." It is also undisputed that the anti-assignment provision purports to restrict the transfer of that interest. The parties further agree that no federal statute, such as the Employee Retirement Income Security Act or the Internal Revenue Code, restricts the transfer of Mr. Wilcox's interest. The only issue we are called upon to decide, then, is whether the incorporation of the anti-assignment provision in the city charter means that "under applicable nonbankruptcy law" the provision is "enforceable."

Dismissing as "unsupported" the retirement system's argument that the restriction on alienation is enforceable under Michigan law just as any other provision of the Detroit City Charter is enforceable, the bankruptcy court decided that the provision is not enforceable because the defined contribution plan is funded solely through the voluntary contributions of city employees. This makes the plan a "self-settled" trust, the bankruptcy court noted, and a self-settled trust cannot be considered a spendthrift trust under Michigan law. *In re Wilcox*, No. 96-41268-S, Adversary Proceeding No. 96-4871-S (Bankr. E.D. Mich.),

opinion dated 1/21/98 at 13. Because the Detroit plan is not a spendthrift trust, the bankruptcy court concluded, "the restriction is not enforceable under federal or state law." Id. In reaching this conclusion the court relied heavily on *In re Dunn,* 215 B.R. 121 (Bankr. E.D. Mich. 1997).

The bankruptcy court's reasoning, both here and in *Dunn,* seems to us to conflict with the United States Supreme Court's holding in *Patterson v. Shumate,* 504 U.S. 753 (1992). There a petitioner had argued, among other things, that the phrase "enforceable nonbankruptcy law" embraced state spendthrift trust law only. The Supreme Court rejected this proposition, as our court had done earlier in the case of *In re Lucas,* 924 F.2d 597 (6th Cir. 1991). Resolving a circuit split on the issue, the Patterson Court held that while Congress intended to include state spendthrift trust law, there was not a "sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to exclude other state and federal law from the provision's scope." *Id.* at 762. The Patterson Court left no room for doubt that "[t]he natural reading [of § 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *Id.* at 757 (emphasis supplied). The Supreme Court has thus clearly indicated that state law other than spendthrift trust law can serve as "enforceable nonbankruptcy law" under § 541(c)(2).

When the instant case reached the district court, that court took a tack differing somewhat from the bankruptcy court's. The district court concluded that the Detroit City Charter provision was not "enforceable," for purposes of § 541(c)(2), because the charter provided no enforcement mechanism; it did "not contain any 'enforcement' language similar to that found in ERISA qualified plans." *In re Wilcox,* No. 98-CV-60511-AA (E.D. Mich.), order dated

6/2/99 at 8. The court further held that the debtor's interest in the plan did not qualify for exemption from the bankruptcy estate as an interest under a spendthrift trust. Id. at 10-12.

The retirement system had relied on *Wyrzykowski v. City of Hamtramck*, 37 N.W.2d 686 (Mich. 1949), for the proposition that home rule city charters are enforceable in Michigan as a valid exercise of municipal power. In Wyrzykowski the Michigan Supreme Court declined to allow a creditor to reach the interest a city employee held in his municipal pension. The district court distinguished Wyrzykowski on the ground that in that case the city had funded the pension itself, which meant that there was a valid spendthrift trust under state law.(4) Wilcox, supra, at 9. The district court then reiterated its central holding: the anti-assignment provision in the Detroit plan is unenforceable because the "Charter does not contain any language which would allow a Plan participant, beneficiary, fiduciary, or a department of the State of Michigan to file a civil action to enjoin any act or practice which violates the terms of the Plan." Id. at 10. In this connection the court referred to *Patterson*, 504 U.S. at 760.

We believe that the district court erred in reading Patterson as requiring that such a right of action be provided if an anti-assignment provision is to be considered "enforceable" for purposes of § 541(c)(2). When the Patterson Court discussed the enforceability of the anti-alienation provision at issue in that case, the Court made three points:

> "Plan trustees or fiduciaries are required under ERISA to discharge their duties 'in accordance with the documents and instruments governing the plan.' 29 U.S.C. § 1104(a)(1)(D). A plan participant,

> beneficiary, or fiduciary, or the Secretary of Labor may file a civil action to 'enjoin any act or practice' which violates ERISA or the terms of the plan. §§ 1132(a)(3) and (5). Indeed, this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar. See *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 107 L. Ed. 2d 782, 110 S. Ct. 680 (1990)." *Patterson*, 504 U.S. at 760.

While the *Patterson* Court did mention, as evidence of enforceability, the existence of a statutory right to file a civil action, the Court did not suggest that the existence of such a right is an indispensable condition of enforceability. On the contrary, the Court mentioned two other indicia of enforceability: (1) ERISA's statutory requirement that plan trustees and fiduciaries discharge their duties, and (2) the Supreme Court's own enforcement of ERISA's anti-alienation provision. In *Guidry*, the case cited by Patterson in connection with the last point, no one had filed suit under ERISA's civil action provision; the *Guidry* Court nonetheless enforced an anti-alienation provision. It is thus reasonably clear, we think, that a statutory right of action is not necessary for nonbankruptcy law to be enforceable for purposes of § 541(c)(2).

Our sister circuits have largely agreed that, after *Patterson*, state and federal restrictions on alienation can satisfy § 541(c)(2) even where there is no statutory right of action. See, e.g., *Whetzal v. Alderson*, 32 F.3d 1302, 1303 - 04 (8th Cir. 1994) (holding that the Civil Service Retirement System's anti-alienation provision was enforceable nonbankruptcy law, without regard to whether a private right of action was available); *In re*

Meehan, 102 F.3d 1209, 1211 - 12 (11th Cir. 1997) (holding that a Georgia statute restricting alienation of individual retirement accounts was an enforceable nonbankruptcy law); *In re Yuhas*, 104 F.3d 612, 614 (3d Cir. 1997) (same with regard to a New Jersey statute). *But see In re Lowenschuss*, 171 F.3d 673, 682 (9th Cir.) (holding that a state anti-alienation provision must contain some "mechanism" for enforcement in order to satisfy § 541(c)(2)), *cert. denied*, 120 S.Ct. 185 (1999).

The anti-assignment provision of the Detroit plan is enforceable because it is part of the Detroit City Charter and has the status of any city charter provision.(5) Michigan courts have enforced various provisions of the Detroit City Charter, including those relating to the Plan, without regard to the availability of a statutory right of action. See, e.g., *Weeks v. Bd. of Trustees, City of Detroit General Retirement System*, 408 N.W.2d 109 (Ct. App. Mich. 1987) (holding that a forfeiture provision in the plan was enforceable); *Lauderdale v. Detroit Municipal Credit Union*, No. 97-720027-CP, at 9 (Circuit court, Wayne County, Mich., March 10, 1998) (holding that the General Retirement System of Detroit had a fiduciary duty to enforce the anti-assignment provision of the plan). When a Michigan appeals court considered the benefits available to Detroit police officers, it said that "[w]ell-established rules of statutory construction mandate that we enforce this clear statutory and city charter language." *Crowe v. City of Detroit*, 603 N.W.2d 107, 110 (Ct. App. Mich. 1999) (enforcing a provision of Detroit's police retirement plan) (emphasis added). And Michigan courts have enforced similar retirement plan provisions enacted in city ordinances. *See, e.g., Hubbard v. Bd. of Trustees of Dearborn Retirement System*, 29 N.W.2d 779, 781 (Mich. 1948) ("The definitions contained in the [pension plan] ordinance must be given full force and effect"). Michigan courts obviously have no doubt about the enforceability of city charter or ordinance provisions

relating to retirement plans; such provisions are enforced when the court follows their command in deciding a case.

We note also that the non-alienation provision of the Detroit plan is enforceable by the retirement system itself, which controls the disbursement of funds. When the retirement system chooses not to honor a request to disburse funds in violation of applicable law, it is enforcing the law. And at least one Michigan state court has held that the retirement system is entitled to seek the judicial remedy of mandamus in order to enforce the terms of the plan as contained in the Detroit City Charter. *Bd. of Trustees of the General Retirement System v. City of Detroit,* No. 88-804793-AW (Circuit court, Wayne County, Mich.), order of July 19, 1988, at 4-5. As mentioned above, the same Michigan court has held that the retirement system has a fiduciary duty to enforce the anti-assignment provision of the plan. *Lauderdale v. Detroit Municipal Credit Union,* No. 97-720027-CP (Circuit court, Wayne County, Mich.), order of March 10, 1998, at 9.

For all of the foregoing reasons, we think that the anti-assignment provision of the Detroit City Charter represents "enforceable" nonbankruptcy law for purposes of 11 U.S.C. § 541(c)(2). We therefore REVERSE the decision of the district court and REMAND the case so that the bankruptcy court may enter judgment in favor of the retirement system. Footnotes

*The Honorable Paul R. Matia, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

1 The relevant provision reads thus:

> "Under general laws the electors of each city and village shall have the power and

authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." Mich. Const. Art. VII, § 22.

2 This provision reads as follows:

"Sec. 4-j. Each city may in its charter provide:

* * *

"(3) Municipal powers. For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state."

3 In this connection Mr. Wilcox signed a document entitled "Security Agreement, Pledge and Assignment, Re: Defined Contribution Plan (Annuity Savings Fund)." The document contained the following provisions, among others:

"I, Michael Wilcox . . . do hereby pledge, assign, convey, transfer and grant a security interest to the Detroit Municipal credit Union ('Secured Party') of the proceeds of my Defined Contribution Plan, also known as my annuity savings fund amounts (commonly referred to as a refund of proceeds of defined contribution plan) held by the Board of trustees of the General or Policemen and Firemen Retirement System of the City of Detroit. I acknowledge that the decision of the Detroit Municipal Credit Union to grant my loan request was based upon the pledge and assignment of the proceeds of my annuity savings fund amounts now on deposit and acquired hereafter as collateral for the loan amount. Said annuity savings fund amount is only available upon retirement or termination of employment.

* * *

"I authorize and direct any person involved in the processing or handling of the said refund of the proceeds of said annuity savings fund to forward such check to the Detroit Municipal Credit Union for deposit in my account. I authorize the Secured Party to endorse said check and deposit the proceeds in my account. I authorize the Secured Party to provide a copy of this document to my employer and retirement system which copy shall serve as an irrevocable direction and authority of my employer and retirement system to forward said check to Secured Party. I authorize the Detroit Municipal Credit Union to enforce its lien and security interest on the annuity savings fund proceeds by withdrawing from

my account owing to the Detroit Municipal Credit Union, or any other method of lien enforcement authorized by law in the event of my default under this loan transaction of this date."

4 We find this distinction unavailing. The source of the plan's funding would be relevant only if state spendthrift trust law were necessarily the determining factor. As we have already seen, the Supreme Court held in *Patterson* that the nonbankruptcy law referred to in 11 U.S.C. § 541(c)(2) is not limited to spendthrift trust law.

5 As the provisions of the Michigan Constitution and Home Rule City Act make clear, cities such as Detroit are empowered to enact any ordinance or charter provision deemed necessary for the public interest, as long as the enactment is not contrary to or preempted by the state constitution or state laws. *Rental Property Owners Ass'n of Kent County v. City of Grand Rapids*, 566 N.W.2d 514, 519 (Mich. 1997). Anti-alienation provisions clearly meet this test, and the bankruptcy trustee does not contend otherwise.

ENTERED BY ORDER OF THE COURT

_____/S/_____
David Nelson, Circuit Court Judge

No. 99-1726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MICHAEL DUANE WILCOX,

Debtor.

CHARLES J. TAUNT, TRUSTEE,

Plaintiff-Appellee,

v.

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT ET AL.,

Defendants-Appellants.

Filed: January 20, 2001

Before: NELSON and NORRIS, Circuit Judges; MATIA, Chief District Judge.(*)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____/S/_____
Leonard Green, Clerk

*The Honorable Paul R. Matia, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: MICHAEL DUANE WILCOX,
Debtor.

Case No. 98-CV-60511-AA
Hon. Barbara K. Hackett
Chapter 7

CHARLES J. TAUNT, TRUSTEE,

Plaintiff-Appellee,

v.

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, and the BOARD OF TRUSTEES OF THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Defendants-Appellants.

_____/

ORDER AFFIRMING THE DECISION OF THE BANKRUPTCY COURT

Before the court is an appeal of the bankruptcy court's orders granting appellee/trustee's motion for summary judgment and denying appellants' motion for summary judgment pursuant to Fed.R.Civ.P. 56. Appellants filed a motion for summary judgment claiming that the debtor Michael Wilcox's interest in the Annuity Savings Plan (Plan), offered to employees of the City of Detroit, did not constitute property of his estate pursuant toll U.S.C. § 541(c)(2). The bankruptcy trustee/appellee

objected and filed a cross-motion for summary judgment. According to appellee, the debtor's interest in the Plan constituted property of the estate and was not exempt from the claims of creditors. After hearing oral arguments on the motions, the bankruptcy court granted appellee/trustee's motion for summary judgment and denied appellants' motion for summary judgment. Although the bankruptcy court found that the debtor's beneficial interest in the Plan was held in trust and that there was a restriction on that beneficial interest, the court determined that the restriction was not enforceable under federal or state law. Accordingly, the bankruptcy court determined that the debtor's interest in the Plan was not excluded from the property of the bankruptcy estate pursuant to 11 U.S.C. § 541 (c)(2). Appellants filed a motion for reconsideration which was subsequently denied by the bankruptcy court. After careful consideration, this court affirms the decisions of the bankruptcy court granting appellee/trustee's motion for summary judgment and denying appellants' motion for summary judgment.

Facts and Background

With regard to the facts surrounding this dispute, the court adopts the bankruptcy court's version of the events.

On January 31,1996, Debtor filed a voluntary Chapter 7 bankruptcy petition. At the time of the filing, Debtor was (and continues to be) employed by the City of Detroit ("City"). As a City employee, Debtor participates in the Defined Contribution Plan, also known as the Annuity Savings Plan ("the Plan"), administered by [Appellants]. This Plan is funded solely through Debtor's voluntary contributions from his salary, and provides that the funds will accumulate until death, disability, twenty-five years of service, or termination of

employment, at which time Debtor may withdraw all funds in a lump sum or receive them in monthly allotments. Because the Plan qualifies under 26 U.S.C. § 401(a) of the Internal Revenue Code ("I.R.C."), Debtor's contributions are tax deferred. Debtor's accumulated interest in the Plan as of the date of filing was $32,141.66.

On July 19,1995, prior to filing his bankruptcy petition, Debtor entered into a revolving loan agreement with the Detroit Municipal Credit Union ("DMCU") with a loan limit of $6,500. Debtor "pledged" his interest in the Plan as collateral for the loan by entering into a "Security Agreement, Pledge and Assignment, Re: Defined Contribution Plan (Annuity Savings Fund)" ("Agreement").

Debtor listed his interest in the Plan on Schedule B of his bankruptcy schedules, but claimed that his interest was exempt pursuant to 11 U.S.C. § 522(d)(10)(E), as necessary for support of Debtor and his dependants. [Appellee] objected to Debtor's claim of exemption. A hearing was held on [Appellee's] objection, at which time Debtor stipulated that his interest in the fund was property of the estate. Notice of that hearing and proceeding was not given to [Appellants]. Accordingly, on July 11, 1996, an order was entered by the Court granting [Appellee's] objection to the exemption. (See Order Granting Trustee's Objection to Exemption, July 11,1996).

On July 19,1996, [Appellee] submitted the entered Order to [Appellants], requesting that Debtor's interest in the Plan be turned over to [Appellee. [Appellants] refused to comply. As a result, on November 6, 1996, [Appellee] filed this adversary proceeding against [Appellants] seeking turnover of Debtor's interest in the Plan. *Taunt v. General Retirement System of the City of Detroit (In re Wilcox)*, 225 B.R. 151, 153-54 (Bankr. E.D. Mich. 1998).]

Standard of Review

This court has jurisdiction to hear appeals "from final judgments, orders, and decrees" of bankruptcy courts pursuant to 28 U.S.C. § 158(a)(1). "When reviewing a bankruptcy court's decision, a district court functions as an appellate court, and applies the standard of review generally applied in the federal courts of appeals." *In re Mary James, Inc.*, 225 B.R. 635, 636 (E.D. Mich. 1998). The standard of review is clear error with respect to findings of fact and de novo with respect to conclusions of law. *See* Fed.R.Bankr.P. 8013; *Canadian Pacific Forest Products Ltd. v. J.D. Irving. Ltd. (In re The Gibson Group, Inc.)*, 66 F.3d 1436,1440 (6th Cir. 1995).

Analysis

Under 11 U.S.C. § 541, the bankruptcy estate generally consists of all legal and equitable interests of the debtor at the time the bankruptcy petition is filed. *In re Dunn*, 215 B.R.121, 124 (Bankr. E.D. Mich. 1997). The scope of the bankruptcy estate pursuant to § 541 was intended to be quite broad. *In re Zott*, 225 B.R. 160, 163 (Bankr. E. D. Mich. 1998); *Humphrey v. Buckley (In re Swanson)*, 873 F.2d 1121, 1122 (8th Cir. 1989). Section 41(c)(2) of the Bankruptcy Code excludes from the property of the estate any property that is held in trust and subject to a restriction on transfer under applicable nonbankruptcy law. *Patterson v. Shumate*, 504 U.S. 753, 758, 112 S. Ct. 2242, 2246, 119 L. Ed. 2d 519 (1992). "This language keeps out of the estate ... property in which the debtor owns the trust's beneficial interest, but subject to a spendthrift clause or some equivalent that prevents the debtor from converting a stream of future payments into a capital sum for current consumption." *McDonald v. Metz (In re Metz)*, 225 B.R. 173, 176 (Bankr. 9th Cir. 1998).

To determine whether the debtor's interest in the Plan was property of the bankruptcy estate, the court must complete a three-step analysis. *In re Dunn*, 215 B.R. at 125. First, the court must determine whether the debtor's interest in the Plan is a beneficial interest in a trust. Id. Second, the court must determine whether there is a restriction on the transfer of the debtor's interest in the Plan. Id. Finally, the court must determine whether that restriction is enforceable under either federal or state law. Id; Patterson, 504 U.S. at 758.

To be considered qualified for tax benefits, a pension and profit sharing plan must contain a provision stating that benefits provided under the plan may not be assigned or alienated. 26 U.S.C. § 401 (a)(1 3)(A). "The primary purpose behind the legislation relating to qualified plans appears to have been to prescribe the time at which employers could deduct their contributions and employees would be required to include the various forms of deferred compensation in their taxable income. ... With a qualified trust, the employer is assured of a deduction at the time his contributions are made and the employee is not held to have realized income until such contributions are either distributed or made available for distribution." *Trebotich v. Commissioner of Internal Revenue,* 492 F.2d 1018, 1024 n.11 (9th Cir. 1974).

In *Dunn*, the bankruptcy court determined that if a restriction on alienation of the debtor's property was enforceable under Michigan law as a spendthrift trust, the property would qualify for protection under § 541(c)(2). 215 B.R. at 127. After analyzing the same plan which is the subject of the instant dispute, the *Dunn* court determined that the City of Detroit's Annuity Savings Plan was not enforceable under Michigan law because the plan was functionally a self-settled spendthrift trust. *Id.* at 128. Because the plan was self-settled, the court determined that it was not a valid spendthrift trust under Michigan

law and, therefore, was subject to the claims of Dunn's creditors. *Id.*

In *Patterson*, the U.S. Supreme Court held that the debtor's interest in an ERISA-qualified pension plan, which includes an anti-alienation provision, may be excluded from the bankruptcy estate pursuant to § 541(c)(2). *Patterson*, 504 U.S. at 765-66. The Court determined that the phrase "applicable nonbankruptcy law" in § 541(c)(2) was not limited to state law. *Id.* at 759. After reviewing legislative materials in an effort to determine Congress' intent behind the phrase "applicable nonbankruptcy law," the Court determined that state spendthrift law is included within the meaning of "applicable nonbankruptcy law. *Id.* at 761-62. However, the Court did not conclude that Congress meant to exclude other state and federal law from § 541(c)(2)'s scope. *Id.* at 762.

Appellants argue that the bankruptcy court erred in interpreting state "nonbankruptcy law" as including only state spendthrift trust law. According to appellants, municipal law may constitute nonbankruptcy law required under § 541 (c)(2). Because the Detroit City Charter outlined the Plan's anti-assignment provision, appellants assert that the provision was enforceable as municipal law. Furthermore, appellants contend that the U.S. Supreme Court's decision in *Patterson* denounced previous judicial interpretation of § 541(c)(2), which required that the property in question comply with state spendthrift trust provisions. Therefore, appellants object to the bankruptcy court's focus on the control the debtor had over the assets in the Plan and on the method in which the Plan was funded.

In contrast, appellees argue that state "nonbankruptcy law" has been interpreted by the courts to exclude from a debtor's estate only such property which constitutes a spendthrift trust. Appellee asserts that the

Detroit City Chanter and related statutes are not applicable nonbankruptcy law providing for the enforcement of the Plan's restrictions. According to appellee, the U.S. Supreme Court's decision in Patterson established that "applicable nonbankruptcy law" as written in § 541(c)(2) must impose a transfer restriction and provide for its enforcement. Furthermore, appellee asserts that the Patterson Court recognized in dicta that government plans, which are exempt from ERISA enforcement, are the property of the bankruptcy estate and should be administered for the benefit of creditors unless the debtor's interest would be exempt under § 522(d)(10)(E), as necessary for the debtor's support and maintenance. Appellee contends that the Home Rule Cities Act and the provisions of the Detroit City Chanter grant Detroit the power to establish a retirement plan with restrictions. However, appellee argues that these sources do not bear on the issue of whether the transfer restriction is enforceable. Appellee asserts that unlike ERISA, the Detroit City Chanter, the Michigan Constitution, and the Home Rule Cities Act contain no provisions to enforce the Plan's transfer restrictions.

According to appellee, the Plan's transfer restriction is not enforceable under federal law because it is not subject to ERISA and the I.R.C. does not provide for enforcement of the restriction. Therefore, appellee argues that the enforceability of the Plan's restrictions must rise or fall based upon the principles of state spendthrift law. Due to the degree of control the debtor had over his contributions in the Plan and the fact that the Plan was essentially a self-settled trust, appellee asserts that the Plan's transfer restriction is unenforceable under Michigan spendthrift law.

In the instant case, the panties do not contest that the Plan is a trust and that it contains a restriction purporting to limit the transfer of the debtor's interest in

the Plan in order to obtain favorable tax benefits. The issue on appeal is whether the restriction is enforceable under applicable nonbankruptcy law. The panties do not contend that the Plan's transfer restrictions would be enforceable under federal law. Since the Plan was established by a governmental entity, ERISA provisions would not apply. Furthermore qualification under § 401(a) of the I.R.C. alone is insufficient to determine whether a transfer restriction is enforceable under federal law. *In re Dunn*, 215 B.R. at 127. Therefore, the court must determine whether the Plan is enforceable under state law.

While the Plan is outlined in Detroit's City Charter, the anti-alienation language is similar to provisions found in the retirement plans of countless private employers, who also wish to obtain favorable tax benefits. However, because the employer in the instant case is a governmental entity, the City of Detroit, and the Plan's provisions are outlined in a public document, the City's Chanter, appellants argue that they are entitled to the protection of § 541 (c)(2). Appellants concede that prior to 1992 most bankruptcy courts restricted the phrase "applicable nonbankruptcy law" to state spendthrift trusts. Appellants' Brief, p 11. According to appellants, the reasoning behind strict application of the spendthrift trust test was to avoid a situation where a debtor would attempt to ward off his creditors by placing money in trusts and declaring bankruptcy when the money was secure and beyond the reach of creditors.

Although this Court does not believe that the phrase "applicable nonbankruptcy law" is intended only to include state spendthrift law, *Lucas v. Lucas*, 924 F.2d 597, 598, 601-602 (6th Cir. 1991), the City of Detroit's Charter does not contain enforcement provisions necessary to exempt the debtor's interest in the Plan from the reach of his creditors. The Charter outlines an Annuity Savings

plan that restricts alienation, but does not contain any "enforcement" language similar to that found in ERISA qualified plans. Unlike ERISA, the Plan does not create any substantive rights that a beneficiary or participant can enforce. *See Patterson*, 504 U.S. at 760 (a retirement plan's transfer restrictions were enforceable under § 541(c)(2) because the plan's trustees or fiduciaries were required under ERISA to discharge their duties in accordance with the documents governing the plan).

Appellants cite *Wvrzvkowski v. City of Hamtramck*, 324 Mich. 731, 37 N.W.2d 686 (1949), for the proposition that home rule city charters are enforceable in the State of Michigan as a valid exercise of municipal power. According to appellants, the anti-alienation provision in the Plan should be enforceable as municipal law because the City of Detroit is a home rule city. However, the facts in *Wvrzykowski* are clearly distinguishable from those in the instant case. In *Wvrzykowski*, the pension was in the nature of a reward. Id. at 736, 37 N.W.2d at 688. The City of Hamtramck (a home rule city) created "a nonassignable, noncontractual pension with a condition and characteristic of nongarnishability." *Id.* The pension was funded almost entirely by the City and could have been considered a valid spendthrift trust. *Id.* at 733, 37 N.W.2d at 687. As a valid spendthrift trust, the debtor's interest in the pension plan in *Wvrzykowski* could have been excluded from a bankruptcy estate pursuant to § 541(c)(2).

Appellants also cite *Chrysler-UAW Pension Plan v. Watkins (In re Watkins)*, 95 B.R. 483 (Bankr. W.D. Mich. 1988) and *Whetzal v. Alderson*, 32 F.3d 1302 (8th Cir. 1994) in support of their contention that § 541 (c)(2) excludes the debtor's interest in the Plan from the bankruptcy estate. However, the facts in each of the cases are clearly distinguishable. In *Watkins*, any alienation restriction would have been enforceable under state

spendthrift law or under ERISA. The private employer made all the contributions to the pension plan and did not provide the debtor with a right to a lump sum payment. 95 B.R. at 485-86. In Whetzal, a former federal employee's interest in retirement benefits was excluded from his bankruptcy estate pursuant to § 541(c)(2) because the Civil Service Retirement Act provided the applicable nonbankruptcy law necessary to enforce anti-alienation provisions in the retirement plan. 32 F.2d at 1303-1304.

Although appellants cite *In re Silviera*, 186 B.R. 168 (Bankr. D. Mass. 1995), in support of their position, this court finds a comparison of *Silviera* and the instant case unpersuasive and lacking precedential value. In *Silviera,* the debtor had been a policeman for the City of Somerville and had participated in a statutorily governed retirement system. Id. at 169. The bankruptcy court held that the debtor's pension plan was excluded from property of the estate since "the [has a beneficial interest in a statutory trust subject to a restriction that is enforceable under applicable nonbankruptcy law." Id. at 172. Although the statutory retirement plan lacked express enforcement procedures which are available in ERISA plans, the Silviera court recognized that Massachusetts courts had routinely discharged attachments that violated the statutory retirement plan. There is no similar body of case law in Michigan in which the courts have discharged attachments to the pension plan outlined in the City of Detroit's Chanter.

In the instant case, the court recognizes the City of Detroit's authority to establish a retirement plan for its employees. However, the City of Detroit Charter fails to provide an enforcement mechanism for the anti-alienation provision in its Plan. The Charter does not contain any language which would allow a Plan participant, beneficiary, fiduciary, or a department of the State of

Michigan to file a civil action to enjoin any act or practice which violates the terms of the Plan. *See Patterson*, 504 U.S. at 760. Because the Plan itself does not contain sufficient enforcement procedures to qualify as applicable nonbankruptcy law, the court next will examine whether the debtor's interest in the Plan would qualify for exemption from the bankruptcy estate as a spendthrift trust.

The Michigan Supreme Court defined a spendthrift trust in *Fornell v. Fornell Equip..Inc.*, 390 Mich. 540, 548, 213 N.W.2d 172,176 (1973).

> In a broad sense, a spendthrift, support, or other similarly protective trust is one created to provide a fund for the maintenance of the beneficiary and at the same time to secure it against his improvidence or incapacity. In a narrower and more technical sense, a spendthrift trust is one that restrains either the voluntary or involuntary alienation by a beneficiary of his interest in the trust, or which, in other words, bars such interest from seizure in satisfaction of his debts. The name "spendthrift trusts" is poorly descriptive, since no spendthriftiness or profligacy of a beneficiary is requisite to, or open to inquiry in determination of, the existence of such a trust.

In general, "spendthrift trusts for the benefit of the settlor are invalid." 76 Am.Jur.2d Trusts § 129 (1992); *Fornell,* 390 Mich. at 545, 213 N.W.2d at 176. It would violate public policy to permit an individual to place his own assets beyond the reach of his creditors. *In re Hertsberg Inter Vivos Trust*, 457 Mich 430, 434, 578 N.W.2d 289, 291 (1998). Anti-alienation restrictions in employee

benefit plans are unenforceable under state spendthrift law to the extent that they are funded by voluntary employee contributions. The theory is that such funds are self-settled. *In re Dunn*, 2158. R. at 128 (citing In re Idalski, 123 B.R. 222, 223 (Bankr. E.D. Mich. 1991)).

> "Spendthrift trusts are upheld on the theory that the donor of the trust has the right to give his property on any condition he sees fit, and the beneficiary's creditors cannot complain that the settlor did not give his bounty to them." Fornell, 390 Mich. at 548, 213 N.W.2d at 176.

Contrary to the appellants' contention, the fact that the debtor solely funded the Plan is controlling. *See In re Hertsberq Inter Vivos Trust*, 457 Mich. at 435-36, 578 N.W.2d at 291-93. Although the court should attempt to honor the intentions of the settlor when reviewing a trust agreement, the court must first determine the identity of the settlor. Id. The settlor of a trust is the individual who provides consideration for the trust. Id. at 435, 578 N.W.2d at 292.

In the instant case, the debtor's interest in the Plan was funded solely through his voluntary contributions. Because the Plan was self-settled, the restriction on alienation was not enforceable since the Plan cannot be considered a valid spendthrift trust under Michigan law. Furthermore, the debtor pledged his interest in the Plan as collateral to obtain a loan from the Detroit Municipal Credit Union. While appellants contend that they would not have honored the debtor's agreement to assign his interest in the Plan to the credit union, it would be inconsistent to allow the debtor to avoid his creditors based upon the Plan's anti-alienation provision after the debtor has assigned his interest in the Plan to obtain a loan. Moreover, the debtor stipulated that his interest in

the Plan was the property of the estate.

Conclusion

For the reasons stated above, this court accepts the bankruptcy court's determination that the debtor's interest in the Plan is not excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The Plan's restriction on alienation was not enforceable under federal law or under state law as a spendthrift trust. Accordingly, the court AFFIRMS the decision of the bankruptcy court and DENIES appellants' petition on appeal.

_____/S/_____
Barbara K. Hackett, District Judge

Dated: June 2, 1999

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: MICHAEL DUANE WILCOX,
Debtor.

Case No. 96-41268
Honorable Walter Shapero
Chapter 7

CHARLES J. TAUNT, TRUSTEE,

Plaintiff

v.

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT ET AL.,

Defendants

MEMORANDUM OPINION

WALTER SHAPERO, Bankruptcy Judge.

This matter comes before the Court on cross motions for summary judgment made pursuant to Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56, in this adversary proceeding brought by Plaintiff (Chapter 7 Trustee Charles J. Taunt), against defendants (General Retirement System of the City of Detroit and the Board of Trustees of the General Retirement System of the City of Detroit), seeking turnover of Debtor, Michael Duane Wilcox's, interest in the Annuity Savings Plan administered by Defendants. Plaintiff claims that no genuine issue of material fact remains for trial that Debtor's interest in the Plan is property of the estate, while Defendants claim just the contrary. Because this Court agrees with Plaintiff that, as

a matter of law, Debtor's interest in the Plan became property of the bankruptcy estate upon Debtor's filing of the Chapter 7 petition, Plaintiff's motion for summary judgment is GRANTED, and defendant's motion for the same is DENIED.

Facts and Background

On January 31, 1996, Debtor filed a voluntary Chapter 7 bankruptcy petition. At the time of the filing, Debtor was (and continues to be) employed by the City of Detroit ("City"). As a City employee, Debtor participates in the Defined Contribution Plan, also known as the Annuity Savings Plan ("the Plan"), administered by Defendants. This Plan is funded solely through Debtor's voluntary contributions from his salary, and provides that the funds will accumulate until death, disability, twenty-five years of service, or termination of employment, at which time Debtor may withdraw all funds in a lump sum or receive them in monthly allotments. Because the Plan qualifies under 26 U.S.C. § 401(a) of the Internal Revenue Code ("I.R.C."), Debtor's contributions are tax deferred. Debtor's accumulated interest in the Plan as of the date of filing was $32,141.66. [FN1]

FN1. Debtor also participates in a separate Defined Benefit Retirement Plan that is funded exclusively by the City. Debtor listed his interest in that Plan as $509.00 on Schedule B of his bankruptcy schedules, and claimed the interest exempt under 11 U.S.C. § 522(d)(5) on Schedule C. Debtor's exemption regarding his interest in this Plan is not at issue.

On July 19, 1995, prior to filing his bankruptcy petition, Debtor entered into a revolving loan agreement with the Detroit Municipal Credit Union ("DMCU") with a loan limit of $6,500. Debtor "pledged" his interest in the Plan as collateral for the loan by entering into a "Security

Agreement, Pledge and Assignment, Re: Defined Contribution Plan (Annuity Savings Fund)" ("Agreement"). The Agreement provided:

> I, Michael Wilcox, ("Debtor") ... do hereby pledge, assign, convey, transfer and grant a security interest to the Detroit Municipal Credit Union ("Secured Party") of the proceeds of my Defined Contribution Plan, also known as my annuity savings fund amounts (commonly referred to as a refund of proceeds of defined contribution plan) held by the Board of Trustees of the General or Policemen and Firemen Retirement System of the City of Detroit. I acknowledge that the decision of the Detroit Municipal Credit Union to grant my loan request was based upon the pledge and assignment of the proceeds of my annuity savings fund amounts now on deposit and acquired hereafter as collateral for the loan amount. Said annuity savings fund amount is only available upon retirement or termination of employment.
>
> I authorize and direct any person involved in the processing or handling of the said refund of the proceeds of said annuity savings fund to forward such check to the Detroit Municipal Credit Union for deposit in my account I authorize the Secured Party to endorse said check and deposit the proceeds in my account. I authorize the Secured Party to provide a copy of this document to my employer and retirement system which copy shall serve as an irrevocable direction and authority of my

> employer and retirement system to forward said check to Secured Party. I authorize the Detroit Municipal Credit Union to enforce its lien and security interest on the annuity savings fund proceeds by withdrawing from my account owing to the Detroit Municipal Credit Union, or any other method of lien enforcement authorized by law in the event of my default under this loan transaction of this date.

(See Security Agreement, Pledge and Assignment, RE: Defined Contribution Plan (Annuity Savings Fund) attached as Exhibit 1 to Trustee's Response to Defendants' Motion for Summary Judgment (emphasis added).)

Debtor listed his interest in the Plan on Schedule B of his bankruptcy schedules, but claimed that his interest was exempt pursuant to 11 U.S.C. § 522(d)(10)(E), as necessary for support of Debtor and his dependants. Plaintiff objected to Debtor's claim of exemption. A hearing was held on Plaintiff's objection, at which time Debtor stipulated that his interest in the fund was property of the estate. Notice of that hearing and proceeding was not given to Defendants. Accordingly, on July 11, 1996, an order was entered by the Court granting Plaintiff's objection to the exemption. (See Order Granting Trustee's Objection to Exemption, July 11, 1996).

On July 19, 1996, Plaintiff submitted the entered Order to Defendants, requesting that Debtor's interest in the Plan be turned over to Plaintiff. Defendants refused to comply. As a result, on November 6, 1996, Plaintiff filed this adversary proceeding against Defendants seeking turnover of Debtor's interest in the Plan.

On May 19, 1997, Defendants filed the instant motion for summary judgment, claiming that no genuine

issue of material fact remains for trial that Debtor's interest in the Plan does not constitute property of the estate under 11 U.S.C. § 541(c)(2), and that Defendants are entitled to judgment as a matter of law. Defendants argue that, because the Plan sets forth a restriction on the transfer of interest that is enforceable under nonbankruptcy law, because the Plan has been qualified by the I.R.C. as tax exempt, and because Debtor has no present rights in the fund, Debtor's interest cannot be considered property of the bankruptcy estate.

On July 2, 1997, Plaintiff filed a cross motion for summary judgment claiming that no genuine issue of material fact remained that, as of July 12, 1996 (the date of Debtor's stipulation that his interest in the Plan was property of the estate), Debtor's interest in the Plan became property of the estate under 11 U.S.C. § 541, and could not be considered exempt under 11 U.S.C. § 522(d)(10)(E). Plaintiff also claims that no genuine issue of fact material fact remains that Debtor's contributions to the Plan are not excluded from property of the estate under 11 U.S.C. § 541(c)(2), because the Plan's restriction on transfer clause is not enforceable under nonbankruptcy law. Finally, Plaintiff claims that Defendants do not have standing to challenge this issue. A hearing was held and the matter was taken under advisement.

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir.1989) (*citing Celotex Corp. v.*

Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 *155 (1986)). Once the moving party satisfies its burden, "the burden shifts to the nonmoving party to set forth specific facts showing a triable issue." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Simply put, summary judgment is appropriate where the issues in a case involve no more than the application of legal principles to undisputed facts. *See, Choate v. Landis Tool Co.*, 486 F.Supp. 774, 775 (E.D.Mich.1980).

Analysis

In analyzing the parties' respective motions for summary judgment, two main issues must be decided. First, whether Defendants have standing. Second, whether 11 U.S.C. § 541(c)(2) excludes from property of the Debtor's estate any or all of Debtor's interest in the Plan.

I. Standing Issue

Plaintiff argues that, because the right to an exemption may not be asserted by others on behalf of a debtor, Defendants do not have standing to assert their claim. Defendants acknowledge that a right to exemption is personal to a debtor; however, Defendants argue that they are not attempting to assert Debtor's right to exemption here. Rather, Defendants claim that they are challenging whether Debtor's interest in the Plan should ever enter the bankruptcy estate at all, and therefore need not be listed as exempt. In other words, Defendants argue that because they base their challenge to Debtor's interest upon § 541(c)(2) as property not part of the bankruptcy estate, and not upon § 522(d)(10)(E) as property of the bankruptcy estate that is exempt, they have standing to asset their claim. This Court agrees with Defendants.

It is well established that assertion of an exemption under bankruptcy law is personal to the debtor. *Lasich v. Wickstrom (In re Wickstrom)*, 113 B.R. 339, 351

(Bankr.W.D.Mich.1990); *Bishop v. Cates (In re Cates)*, 73 B.R. 874, 877 (Bankr.D.Or.1987). The right to an exemption may not be asserted by others on behalf of the debtor. *Cates*, 73 B.R. at 877 (*citing Matter of Osburn*, 56 B.R. 867 (Bankr.S.D.Ohio 1986)). However, a challenge as to whether a debtor's asset is excluded from the bankruptcy estate under § 541(c)(2) may be asserted by a party in interest, even when the debtor concedes or does not otherwise contest that the asset is included in the estate. See, e.g., *Humphrey v. Buckley (In re Swanson)*, 873 F.2d 1121. 1122 (8th Cir.1989). Therefore, Defendants in the instant case have standing to challenge whether Debtor's interest in the Plan is property of Debtor's bankruptcy estate under § 541(c)(2).

II. Property of the Bankruptcy Estate Issue

Because alienation and transferability provisions vary among retirement plans, the application of § 541(c)(2) to such plans must be made on a case by case basis, where each case and plan is evaluated on its own facts. *Simon v. Braden (In re Braden)*, 69 B.R. 93, 94 (Bankr.E.D.Mich.1987). Therefore, a brief overview of the Plan at issue is necessary before analyzing the application of § 541(c)(2) to the Plan and facts of this case.

A. The Annuity Plan

The City of Detroit Charter, that established and governs the Plan, describes the Plan as follows:

> "Sec. 1. Annuity Savings Fund.
> (a) The Annuity Savings Fund shall be the fund in which shall be accumulated at regular interest the normal contributions of members to provide their normal annuities and the additional contributions of members to provide their additional annuities. From and after September 2, 1996, the normal

> contributions of a member to the retirement system shall be the sum of three per cent of the amount of his annual compensation that may be subject to taxation under the provisions of the Federal Insurance Contribution Act plus five per cent of the portion of his annual compensation, if any, which exceeds the amount of his annual compensation that may be subject *156 to taxation under the provisions of the Federal Insurance Contributions Act."

(Exhibit D, p 32, Attached to Plaintiff's Motion for Summary Judgment.)

City employees voluntarily contribute to this Plan. Title 9, Chapter 6, Article 9, Section 1 of the 1974 [FN2] Charter sets forth a restriction upon alienation, as required under 26 U.S.C. § 401(a), for favorable tax treatment. Specifically, the anti-alienation provision states:

FN2. Defendants note that the 1997 City Charter simply incorporates all provisions existing as of the date of the 1974 Charter. (See Exhibit A, attached to Defendants' Brief in Support of Motion for Summary Judgment.)

> Sec. 1. Assignments Prohibited.
> The right of a person to a pension, annuity, or retirement allowance, to the return of accumulated contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter and the moneys in the various funds of the retirement system shall be unassignable and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency law,

or any other process of law whatsoever, except as specifically provided in this chapter.

(See Exhibit C, p 37, attached to Defendants' Brief in Support of Motion for Summary Judgment.)

B. The Application of 11 U.S.C. § 541(c)(2)

Under 11 U.S.C. § 541, the bankruptcy estate generally consists of all legal and equitable interests of the debtor at the time of filing of the bankruptcy petition. The scope of the bankruptcy estate under § 541 was intended to be quite broad. Swanson, 873 F.2d at 1122. However, under § 541(c)(2), restrictions on the transfer of any beneficial interest a debtor may have in a trust that is enforceable under applicable nonbankruptcy law, including federal law such as the Employment Retirement Income Security Act of 1974 ("ERISA") [FN3], may be excluded from property of the bankruptcy estate. [FN4] *Patterson v. Shumate*, 504 U.S. 753, 758, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). The application of § 541(c)(2) requires a three-step analysis: (1) whether the debtor's interest is a beneficial interest in a trust; (2) whether there is a restriction on the transfer of that beneficial interest; (3) whether that restriction is enforceable under nonbankruptcy law. *Id.*

FN3. 29 U.S.C. § 1001 et seq.

FN4. Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2).

In the recent case of *In re Dunn*, 215 B.R. 121,

123-25 (Bankr.E.D.Mich.1997), Chief Judge Steven Rhodes analyzed a Debtor's interest in the identical Plan under similar facts using that three-step inquiry, and found that the Debtor's interest was not excluded from property of the estate under § 541(c)(2) as a trust, because the anti-alienation clause was not enforceable under applicable nonbankruptcy law. Specifically, Judge Rhodes found that, although the Plan was a trust and does have a restriction on transfer, that restriction was not enforceable under federal nonbankruptcy law (ERISA or the I.R.C.), nor was the restriction enforceable under state law as a spendthrift trust. Id. This Court agrees with Judge Rhodes' conclusion in *Dunn*, and therefore finds that Debtor's interest in the same Plan is not excluded from property of Debtor's bankruptcy estate under § 541(c)(2).

1. Whether Debtor's Interest in the Plan is Held in Trust by Defendants

In order to find an express trust arrangement, the following must be present: (1) a clearly defined res; (2) an unambiguous trust relationship; and (3) specific, affirmative duties undertaken by a trustee. *See In re Johnson*, 691 F.2d 249, 252-53 (6th Cir.1982). The use of the words "settlor" and "trustee" in the body of an agreement are not necessary if the nomenclature in the instrument establishes a trust arrangement. *See Union Guardian Trust Co. v. Nichols*, 311 Mich. 107, 18 N.W.2d 383, 385 (1945).

Here, all three elements of an express trust are present. First, Debtor's voluntary contributions to the Plan define a clear res. Second, an unambiguous trust relationship exists where Debtor, and similarly situated employees, contribute money to the Plan with the intention that it be administered by Defendants. Third, the Plan outlines specific, affirmative duties that Defendants, who are referred to in the Plan as "trustees," must

undertake. Therefore, although the word "trust" does not appear in the language of the Plan itself, this Court concludes that the funds contributed to the same are clearly held in an express trust. *See Johnson*, 691 F.2d at 252-53; *Nichols*, 18 N.W.2d at 385.

2. Whether There is a Restriction on the Transfer of that Beneficial Interest

As noted *infra*, Title 9, Chapter 6, Article 9, Section 1 of the 1994 City Charter, that established and governs the Plan, sets forth a restriction upon alienation provision. Therefore, having found that the Plan is held in trust, and that there is a restriction on the transfer of Debtor's beneficial interest in the Plan, the relevant inquiry becomes whether that restriction is enforceable under applicable nonbankruptcy law. *Shumate*, 504 U.S. at 758, 112 S.Ct. 2242.

3. Whether the Restriction is Enforceable Under Applicable Nonbankruptcy Law

In *Shumate*, the Supreme Court resolved a split among the circuits as to whether "applicable nonbankruptcy law" as referred to in § 541(c)(2), was limited to state law regarding spendthrift trusts. Shumate, 504 U.S. at 757, 112 S.Ct. 2242. In holding that the text of § 541(c)(2) does not support such a limitation, the Court found that the provision encompasses any relevant nonbankruptcy law, including federal law such as ERISA. Id. at 759, 112 S.Ct. 2242. Thus, this Court must examine the restriction at issue under applicable federal and state law.

a. Federal Nonbankruptcy Law ERISA

Because ERISA provides for enforcement of the

required transfer restriction, a plan that is ERISA qualified is excluded from the bankruptcy estate without regard to state spendthrift trust law. *Shumate*, 504 U.S. at 760, 112 S.Ct. 2242. However, as found by Judge Rhodes in *Dunn*, the Plan at issue is not subject to ERISA because it is a governmental plan. See *Dunn*, 215 B.R. at 125-26 (citing 29 U.S.C. § 1002(32), § 1003). Therefore, the restriction is not enforceable under ERISA.

I.R.C.

The Internal Revenue Service issued a letter to Defendants on March 5, 1997, stating that the Plan qualified under 26 U.S.C. § 401(a) for favorable tax treatment. Defendants claim that restriction is enforceable because of the Plan's § 401(a) status. Stated differently, Defendants invite this Court to adopt the premise that, once a restriction on alienation qualifies a plan for § 401(a) status, the restriction automatically is enforceable under nonbankruptcy law for purposes of § 541(c)(2). The Court declines Defendants' invitation. As stated, in *Shumate,* the Supreme Court settled a dispute within the circuits as to whether the phrase "applicable nonbankruptcy law," as used within § 541(c)(2), is limited to state law regarding spendthrift trusts, and found that language of this provision did not embrace such a limitation. *Shumate*, 504 U.S. at 757-59, 112 S.Ct. 2242. The Court also held that a plan that is ERISA qualified is excluded from the bankruptcy estate without regard to state spendthrift trust law, because ERISA provides for enforcement of the required transfer restriction. Id. at 760, 112 S.Ct. 2242. However, the Court did not extend this reasoning to a plan that qualifies under 26 U.S.C. § 401(a).

Since *Shumate*, several courts have grappled with the issue of whether a plan's qualification under § 401(a) alone (a plan that does not also qualify under ERISA),

creates an enforceable restriction against transfer. [FN5] *158 The majority of the cases decline to expand the holding of *Shumate* to this degree. See, e.g., *Dunn*, 215 B.R. at 126-28. This Court agrees with those cases on the basis that, unlike a plan qualified under § 401(a), a restriction may be enforced by a participant in an ERISA qualified plan. Id. *(citing Witwer*, 148 B.R. at 937). In other words, because an ERISA qualified plan creates substantive rights that a beneficiary or plan participant may enforce, such a plan automatically creates an enforceable restriction irrespective of state spendthrift trust law. However, because an IRC § 401(a) qualified plan does not, by itself, create such a substantive right, it alone does not automatically create an enforceable restriction. Id. (*citing Witwer*, 148 B.R. at 937; *S.E.C. v. Johnston*, 922 F.Supp. 1220, 1225 (E.D.Mich.1996)).

FN5. See, e.g., *Dunn*, 215 B.R. at 126-28; *In re Copulos*, 210 B.R. 61, 64 (Bankr.D.N.J.1997); *In re Hall*, 151 B.R. 412, 418-421 (Bankr.W.D.Mich.1993); *In re Witwer*, 148 B.R. 930, 936-37 (Bankr.C.D.Cal.1992), *aff'd*, 163 B.R. 614 (9th Cir. BAP 1994).

Accordingly, this Court agrees with the holding in *Dunn* that the Plan's § 401(a) status alone is insufficient to find a restriction enforceable. The issue then becomes whether the restriction is enforceable under state spendthrift trust law.

b. State Nonbankruptcy Law

If the restriction on alienation is enforceable under Michigan law as a spendthrift trust, then the Plan qualifies for protection under § 541(c)(2). *Dunn*, 215 B.R. 121, 127-28. In *Fornell v. Fornell Equip., Inc.*, 390 Mich. 540, 213 N.W.2d 172 (1973), the Michigan Supreme Court embraced the following definition of a spendthrift trust: "In a broad sense, a spendthrift, support, or other similarly

protective trust is one created to provide a fund for the maintenance of the beneficiary and at the same time to secure it against his improvidence of incapacity. In a narrower and more technical sense, a spendthrift trust is one that restrains either the voluntary or involuntary alienation by a beneficiary of interest in the trust, or which, in other words, bars such interest from seizure in satisfaction of his debts. The name 'spendthrift trusts' is poorly descriptive, since no spend thriftiness or profligacy of a beneficiary is requisite to, or open to inquiry in determination of, the existence of such a trust." 54 Am.Jur., Trusts, § 148, p 123. *Fornell*, 213 N.W.2d at 176.

> "Spendthrift trusts are upheld on the theory that the donor of the trust has the right to give his property on any condition he sees fit, and the beneficiary's creditors cannot complain that the settlor did not give his bounty to them. A person cannot, however, create a true spendthrift trust for himself." *Id.*

Here, the Plan at issue is funded solely through voluntary contributions by Debtor. Therefore, because the Plan is self-settled, the restriction on transfer is not enforceable because the Plan cannot be considered a spendthrift trust under Michigan law. *Fornell*, 213 N.W.2d at 176. *See also In re Idalski*, 123 B.R. 222, 233 (Bankr.E.D.Mich.1991) (antialienation provisions in employee benefit plans that are funded solely by employee voluntary contributions are not enforceable under state law because the plans are self- settled). [FN6]

FN6. Defendants also raise a cursory argument that, because the Plan was established pursuant to the City Charter; because the Charter has always provided for a restriction on the transfer of a beneficial interest in the Plan; and because the state statute governing the

retirement plans of municipalities other than cities electing to be Home Rule jurisdictions (Mich. Comp. Laws Ann. § 38.40 (West 1997)), also contains an anti-alienation provision, the restriction at issue is enforceable. This Court is not persuaded by Defendants' unsupported argument. Defendants provide no authority to support their claim that simply because City Charters or their State (or some other governmental) counterpart provide for a restriction on alienation, the restriction is per se enforceable, and this Court is not inclined to adopt such reasoning. Furthermore, this Court could not find relevant authority to support Defendants' argument. Rather, this Court's search found the case law regarding Defendants' claim distinguishable and not relevant to the facts at hand. *See In re Dunn* (Supplement to Opinion), 215 B.R. 848 (Bankr.E.D.Mich.1997) (citing *Wyrzykowski v. City of Hamtramck*, 324 Mich. 731, 37 N.W.2d 686 (1949)).

Accordingly, although the Court finds that Debtor's beneficial interest in the Plan is held in a trust, and that there is a restriction on that beneficial interest, the Court concludes that the restriction is not enforceable *159 under federal or state law. As such, Debtor's interest is not excluded from property of the bankruptcy estate under § 541(c)(2). *Shumate*, 504 U.S. at 757, 112 S.Ct. 2242.

C. Distribution of Debtor's Interest in the Fund

Because this Court finds that Debtor's interest in the Plan is property of the estate under § 541, the issue becomes whether Plaintiff is able to compel Defendants to turnover Debtor's interest in the Plan as determined or valued at the time of filing. Defendants argue that, because Debtor remains employed by the City and thus has no present right to withdraw contributions from the Plan, nor would Debtor be eligible to obtain a withdrawal within 180 days of the time of filing bankruptcy, Plaintiff

cannot compel turnover because Plaintiff's rights in the Plan cannot exceed Debtor's rights. Plaintiff, however, argues that if the transfer restriction is unenforceable, then Debtor can freely assign, transfer, or otherwise dispose of his interest in the "shattered trust," and that Plaintiff should be able to do the same because Plaintiff stands in Debtor's shoes. In other words, Plaintiff argues that if the transfer restriction is not enforceable, then Debtor has present rights in the plan that should be available to Plaintiff.

Defendants rely upon *Magill v. State Employees' Retirement Sys. of Ill. (In re Lyons)*, 957 F.2d 444 (7th Cir.1992) in support of their position. In *Lyons*, the Court of Appeals for the Seventh Circuit resolved a split among the courts in that circuit, and held that a trustee could not compel turnover of a debtor's contributions to a state employee pension plan (even if such contributions were estate property) when the debtor had no present right to the plan, because the trustee's claim to estate property is no greater than the debtor's claim at the time of filing. *Id.* at 445-46. The Court recognized that its holding did not further the Bankruptcy Code's goal of encouraging the expeditious administration of the bankruptcy estate for the benefit of creditors. Id. However, the Court believed that a contrary holding would violate the Code because it would give the trustee greater rights in the property of the debtor's estate than the debtor had at the time of filing. Id. In arriving at this conclusion, the Court noted that courts in other jurisdictions had reached a contrary result and compelled turnover of similarly situated funds. *Id.* at 446 n. 3.

This Court recognizes and embraces the basic premise of bankruptcy law followed in *Lyons*, that a trustee succeeds only to the title and rights in property that the debtor had at the time he filed the bankruptcy petition. However, this Court finds that compelling

turnover of Debtor's interest in the Plan to Plaintiff does not violate this premise due to the character of the Plan and the manner in which Debtor was allowed to control his interest in the same. Unlike the Debtor in *Magill*, who was not allowed to withdraw contributions for hardship, loans, or payments to creditors, Debtor in the present case was allowed to pledge his interest in the Plan to obtain loans. *Magill*, 957 F.2d at 445. Specifically, because the restriction on transfer is not enforceable under nonbankruptcy law, and because Debtor was allowed to pledge his interest in the Plan as collateral for a loan with the DMCU, this Court believes that Debtor had present rights in the Plan at the time of filing that are available to Debtor's creditors.

As stated, because the Plan at issue is a self-settled trust by Debtor, it is not a valid spendthrift trust under Michigan law, and Debtor's interest therein may be obtained by his creditors. *See Fornell*, 213 N.W.2d at 176. A self-settled trust "is binding on [the settlor] in so far as it is still within his power to alien or encumber it with debts;" however, it would be inequitable to allow such a trust to be binding on the beneficiary's creditors. Id. (quoting 54 Am.Jur., Trusts, § 166, p 135). Such is the case here, where Debtor voluntarily placed tax deferred contributions in the Plan, and was allowed to alien and encumber his interest by pledging it as collateral for a loan with the DMCU. As such, the Court cannot allow the inequitable result of preventing Debtor's other creditors, whose interests are similar to that of the DMCU, from reaching his interest in the Plan. *Accord *160 Hunter v. Ohio Citizens Bank (In re Hotchkiss)*, 75 B.R. 115, 118-20 (Bankr.N.D.Ohio 1987) (finding that where a pension plan did not qualify as a spendthrift trust, the Debtor's interest in the same was not excluded under § 541(c)(2), and therefore compelled turnover of the Debtor's interest to the Trustee).

Support for this Court's conclusion is also found in Dunn. There, on at least two occasions, the Debtor pledged his interest in the Plan as collateral for a loan with the DMCU. Judge Rhodes concluded that "[t]he practical result of the arrangements among Dunn [the Debtor], the Detroit Municipal Credit Union and the GRS is that Dunn can obtain distributions of Plan funds at any time, regardless of the Plan provisions regarding distribution." *Dunn*, 215 B.R. at 128-29. To elaborate, despite the transfer restriction, Debtor is able, basically at his whim, to obtain access to his interest in the Plan by borrowing the desired amount from the DMCU. The arrangement between Defendants, the DMCU, and Debtor (as well as similarly situated debtors) has effectively left Debtor with what is analogous to and the functional equivalent of a revolving loan agreement that affords Debtor continuous access to his interest in the Plan. The substantive result is thus not materially different than if what Debtor had was a regular savings account solely in his name (with the added bonus of tax preferential treatment). Simply put, when looked at in that proper perspective, because Debtor is able to have effective access to his interest in the Plan at anytime (albeit by pledging his interest to the DMCU through security agreements) without terminating his employment or retiring, it logically follows that Plaintiff should also enjoy similar immediate access to the fund. Thus viewed, such conclusion does not do violence to the principle that a trustee's rights should not be greater than a debtor's rights, but is actually consistent with this principle.

Accordingly, this Court concludes that Defendants are compelled to turnover to Plaintiff the value of Debtor's interest as of the time of the bankruptcy filing. To hold otherwise under these facts would defeat the purpose of § 541(c)(2) and effectively render it a nullity, because Debtor would enjoy the protection § 541(c)(2) provides, without meeting the requirements of this section. The

spirit of the Code, if not the Code itself, prohibits such a result.

Plaintiff shall submit an order consistent with this opinion.

SO ORDERED

_____/S/_____
Walter Shapero, Bankruptcy Judge